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No. 97-1381

In The

Supreme Court of the United States

October Term, 1997

MATTHEW STARK and MARCIA NEELY,

Petitioners,

vs.

INDEPENDENT SCHOOL DISTRICT NO. 640,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the operation of a public school, operated exclusively by a public school district, offering the same secular public school curriculum as is offered throughout the district and open to all students is consistent with the Establishment Clause?

2. Whether a public school district's neutral policy, now mandated by Minnesota law, Minn. Stat. Ann. § 126.699, of accommodating all reasonable parental requests for curriculum exemptions and alternative instruction for their children, regardless of motivation, is consistent with the Establishment Clause?

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STATEMENT OF THE CASE

This case involves a *public school district* employing *public school teachers* to teach the school district's *standard public school curriculum* in a *public school.* It also involves the operation of a state-mandated neutral policy of accommodating all parental curriculum objections. Petitioners, however, misrepresent the central facts of this case, the applicable law, and the sound decision of the United States Court of Appeals for the Eighth Circuit in *Stark v. Independent School District No. 640*, 123 F.3d 1068 (1997). As a result, the purported question that Petitioners present to this Court is founded solely on these factual distortions, and bears no resemblance to the real issues in this case.

Specifically, Petitioners contend that this case involves the opening of a religious school by a public school district, which is operated exclusively for the benefit of one sect, where strict religious separatism is enforced by the school district, and where the district has purposely and materially altered the curriculum in order to conform to a particular religious dogma. These fantastic suggestions are, of course, all falsehoods. Petitioners' contentions have no support in the record and are contrary to the real facts of this case which are clearly recited in the Eighth Circuit Court's decision. The petition, therefore, is founded on little more than the assertions of *factual error*, and presents no cause for this Court's review.

The true facts of this case do not give rise to any violation of the Establishment Clause. This case concerns a public school operated by Independent School District No. 640 in Vesta, Minnesota ("the School District" or "ISD 640"). The Vesta school is a *public school in all respects*, open to any student who wishes to attend. It is under the complete control of the public school district, and offers the same secular curriculum as the other public school operated by the School District (the Wabasso school). The School District *alone* has full authority over the Vesta school and is responsible for hiring and supervising teachers, providing the curriculum, and selecting all books and instructional materials.

Since 1985, the School District has had a neutral policy — now mandated by Minnesota state law, Minn. Stat. Ann. § 126.699 — of accommodating parental requests for exemption from aspects of the public school curriculum that violate the consciences of parents and/or their children. ISD 640 has implemented its neutral policy on numerous occasions in the past, granting various requests of other parents for exemption. In this case, the parents of individual students attending the Vesta public school requested exemptions from computer and technology education. These individual requests were granted — as they had been at the Wabasso school[1] — and alternative education was provided.

The Eighth Circuit Court's decision correctly held that operating a public school and implementing a state-mandated neutral accommodation policy do not violate the Establishment Clause. The court's decision properly reversed an unprecedented district court opinion permanently closing down a Minnesota public school and enjoining the operation of ISD 640's longstanding neutral policy, now mandated by Minnesota law, of granting conscience-based parental requests for exemption of their children from aspects of public school curriculum. The Eighth Circuit Court's decision is founded solidly on the well-established case law of this Court, and is consistent with the law of all other federal courts.

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1. In their brief, Petitioners state that ISD 640's neutral policy operates throughout the district and that these particular exemption requests had also been accomodated at the Wabasso school. *Petition for Certiorari* at 3. However, Petitioners never explain why the same exact policy that is constitutional when employed at the Wabasso school, somehow becomes unconstitutional 14 miles away at the Vesta school. In truth, whether the students are accommodated at the Vesta school or Wabasso School is of no constitutional moment. Most recently, this Court recognized in *Agostini v. Felton*, 117 S. Ct. 1997 (1997) that it is neither "sensible" nor "sound" to propound a legal doctrine in which "the only difference between a constitutional program and an unconstitutional one is the location of the classroom . . . ." *Id.* at 2012.

A. The Petition Misrepresents The Central Facts of This Case.

Petitioners misrepresent the most basic facts of this case. As outlined below, even more telling than the facts Petitioners attempt to distort are those they fail to reveal to this Court. Indeed, Petitioners' brief amounts to little more than a claim of factual error. This Court's Rules, however, are clear: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." United States Supreme Court Rule 10. Petitioners' eleventh-hour attempt to reargue the facts of this case — which Petitioners themselves recognized as undisputed below[2] — is far too late and certainly does not merit Supreme Court review. A petition for certiorari should not be granted based on claims of alleged factual errors, especially when those claims have absolutely no support in the record.

1. *The Vesta School Is A Public School In All Respects.*

Independent School District No. 640 is a public school district located in rural southwestern Minnesota and covers approximately

2. Petitioners' application for a writ of certiorari is founded on an alleged factual dispute. However, in every other brief filed by the Petitioners in this case, including all of their briefs on appeal, they stipulated that the facts of this case are undisputed and repeatedly stated so. Indeed, Petitioners filed their own motion for summary judgment in the district court. Petitioners *never* objected to any of the record evidence or testimony, including any affidavits. Further, during oral argument on cross summary judgment motions in the district court, after the close of discovery and in light of all record evidence, counsel for the Petitioners expressly stated that *"one of the few things the parties agree on is that the facts are undisputed,* and I think the core nucleus of facts is relatively small." Transcript of Summary Judgment Argument at 3 (Appendix C). If a Petition for Certiorari is not to be based on alleged factual errors, then *a fortiori* it cannot be the appropriate vehicle for factual disputes that were never raised during the entire proceeding in the district court, nor ever suggested during the appeal of this case.

225 square miles of sparsely populated, primarily agricultural land, which includes the towns of Vesta and Wabasso. School District enrollment in the elementary grades is approximately 200 students per year. The School District operates two public schools, one in Wabasso and one in Vesta.[3]

The Vesta school is a *public school* in all respects. *Stark v. ISD 640*, 123 F.3d 1068, 1073-74 (8th Cir. 1997). As the Eighth Circuit Court correctly found, the Vesta school is open to any student who wishes to attend. *Id.* The uncontradicted record establishes that ISD 640 has given all students in the district their choice of either school; no one has ever been turned away from either Vesta or Wabasso.[4]

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3. For several years prior to 1984, ISD 640 operated a public elementary school in Vesta. In May, 1984, however, the School District was forced to close the school for economic reasons. *Stark v. ISD 640*, 123 F.3d at 1070. During the 1992-93 school year, a group of Vesta parents approached School Superintendent George Bates about the possibility of reopening a public elementary school in Vesta. The undisputed facts establish that each of these individual parents had particular secular reasons for requesting the reopening of a public school in Vesta and, ultimately, for deciding to send their children to the Vesta school. *Id.* at 1071. The School Board discussed the proposal to reopen a public school in Vesta and held several public meetings regarding the proposal. *Id.* at 1071. The Board ultimately decided to reopen the Vesta public school using a multi-age classroom. There were also multi-age classrooms at Wabasso. The uncontraverted record establishes that the School District decided to reopen the Vesta school for purely secular reasons including numerous educational and financial reasons. This Court made clear forty years ago that "[i]t is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." *Everson v. Bd. of Educ.*, 330 U.S. 1, 7 (1947).

4. The record is undisputed on this point: every student in the School District has been able to attend the public elementary school of

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Like the Wabasso school, the School District *alone* has sole and complete authority over all aspects of the Vesta public school including, but not limited to, operating the school; hiring, supervising, and evaluating teachers and teachers' aides;[5] setting the curriculum and selecting all books and other instructional materials used at the school. *Id.* at 1071. Therefore, Petitioners' false claim that the Vesta public school is some sort of "joint venture" between ISD 640 and a religious group is utterly without factual support.[6] Indeed, it is flatly contradicted by the overwhelming and — up until now — undisputed record evidence.

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his or her choice. No student has ever been denied the opportunity to attend the Vesta school. Indeed, contrary to Petitioners' unsupported assertions, in May 1993 the School District solicited students from throughout the district for its multi-age classrooms for the 1993-94 school year, including for the multi-age classroom at the Vesta school. This was made clear in the testimony of the school superintendent. The opening of the Vesta public school had also been repeatedly announced to the public at several open hearings conducted by the School Board. Fifty-four students registered for multi-aged classrooms for the 1993-94 school year. Thirty-five students applied for the Wabasso multi-age classrooms; nineteen applied for the Vesta multi-age classroom. The School District was able to honor the requests of *all students* regarding their choice of schools.

5. The two teachers at the Vesta school were, of course, hired without regard to religion. Ironically, it is only Petitioners themselves who have ever been interested in the religious beliefs of everyone affiliated with the Vesta school, including School Board members, teachers, students, and parents. During discovery in the case, Petitioners questioned both teachers about their personal religious beliefs and established for the record that neither of them subscribes to the "Brethren" belief system. (Both are Lutherans.) Further, the School District does not collect information, nor does the record contain information, concerning the religious beliefs of the students at either the Vesta or Wabasso schools.

6. In fact, Petitioners' suggestion that the Vesta school is some
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ISD 640 exercises precisely the same rights and authority at the Vesta school as it does at the Wabasso school. The parents of the students at the Vesta school are accorded the same rights as the parents of students at the Wabasso school — no more, no less. Any student in the district who wishes to attend either the Vesta school or the Wabasso school may do so.

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sort of a "joint enterprise" with a religious sect is belied not only by the entire factual record, but also by the only piece of evidence that Petitioners claim somehow supports this contention. Specifically, the Lease that Petitioners attempt to rely on, even to the extent it is relevant, expressly provides that: (1) the Vesta school shall be operated exclusively by the School District and shall be "a public school for any resident student" in the district (Art. I, § 1); (2) the School District is solely responsible for hiring and supervising teachers and teaching staff (Art. I, § 2); (3) the School District *alone* establishes the curriculum and rules for the Vesta school, "in compliance with state laws and rules" (Art. I, § 4); (4) the School District alone is responsible for selecting and providing "such classroom materials as it deems necessary for the instruction of students" (Art. I, § 5); (5) the School District retains the "sole discretion" regarding approval of any textbooks or instructional materials (Art. I, § 5); (6) "All policies adopted by the School Board of the School District . . . shall apply" at the Vesta school (Art. I, § 11); (7) no religious symbols or artifacts would be displayed at the school and no religious instruction would take place (Art. II, § 9); and (8) any requested exemption from computer education at the school would be granted only "to the extent permitted under applicable law and rules and regulations adopted by the School Board of the School District" (Art. I, § 6). *See also Stark v. ISD 640*, 123 F.3d at 1071. The document cited by Petitioners, therefore, only confirms the other voluminous and uncontradicted record evidence proving that the Vesta school is a public school in all respects, and that the School District's neutral exemption policy operates in the same manner at the Vesta school as it does at Wabasso. Further, in granting the lessor's Motion to Dismiss early in the case, even the district court found that the Lease, on its face, did not violate any constitutional provisions.

2. *ISD 640 Offers The Same Secular Curriculum — Including Technology Instruction — At The Vesta And Wabasso Schools.*

The academic curriculum offered by ISD 640 at the Vesta school is the same secular curriculum the district offers at Wabasso and "has not been altered in any way." *Stark v. ISD 640*, 123 F.3d at 1074. This includes computer and audio/visual instruction which, as the Eighth Circuit Court affirmed, are available as part of the curriculum offered at the Vesta school.[7] *Id.* In fact, computers, a copy machine, a fax machine, and other electronic equipment are physically present and used in the Vesta school. Religion plays no role at the Vesta or Wabasso schools: no religious instruction takes place and no religious symbols or artifacts are present at either school. *Id.* at 1072.

In addition to employing the same secular curriculum, all School District policies apply equally at the Wabasso and Vesta schools. In short, computer education — the only aspect of the Vesta curriculum that Petitioners have placed at issue in this case — is offered as part of the curriculum at the Vesta school. Indeed, contrary to Petitioners' contention, not all current students at the

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7. Contrary to the undisputed testimony in the record from numerous witnesses, including the school superintendent and the two teachers employed at the Vesta school, petitioners now make the unsupported claim that technology is not available at the Vesta school. In addition to the voluminous and uncontradicted record evidence establishing that computer, technology, and audio/visual education is available at the Vesta school, an amicus brief submitted below on the School District's behalf by unanimous vote of the Wabasso Education Association ("WEA") (the local teachers' union) included photographs of the computer equipment, fax machine, and other technological equipment available to students *in the classroom at the Vesta school.* All 29 local teachers who belong to the WEA and teach in ISD 640 voted to file their amicus brief because they were "appalled at the factual misrepresentations present" in the Petitioners' briefs below and now in this Court, which "do not describe what exists in Vesta, Minnesota."

Vesta school have requested an exemption from the computer curriculum and the computer equipment available at Vesta is being used.

3. *ISD 640's Neutral Policy Of Accommodating Parental Exemption Requests, Mandated By Minn. Stat. Ann. § 126.699, Operates In The Same Way At Both The Vesta and Wabasso Schools.*

Since 1985, the School District has had a policy of accommodating parental requests for exemption from aspects of the curriculum that violate the consciences of parents and/or their children. Minnesota state law now requires all school districts to establish such a neutral procedure to accommodate conscience-based parental requests for exemption from public school curriculum and instructional materials. Minn. Stat. Ann. § 126.699. It is undisputed that, over the years, ISD 640 has received numerous objections to aspects of the curriculum from various parents and students and, consequently, many requests for exemptions and alternative instruction. Examples include requests for exemptions from drug education, self-esteem training, computer use, certain books, certain audio and visual presentations, and sex education. *Stark v. ISD 640*, 123 F.3d at 1074.

When parents make a reasonable request for exemption from an aspect of the public school curriculum, the School District — as it must under state law — routinely grants the exemption and arranges for alternative education. There is no evidence that the School District has ever denied such a request. To the contrary, the record establishes that ISD 640 has implemented its neutral policy on numerous occasions in the past, granting the various exemption requests of other parents, regardless of motivation. *Stark v. ISD 640* at 1074. From the School District's perspective, the parental motivation for particular exemption requests — religious or otherwise — is immaterial, because Minnesota state law requires school districts to accommodate all reasonable parental requests

for exemption. The School District simply takes such requests at face value, assumes the good faith of local parents, and attempts to accommodate them. *Id.* at 1074 ("The record shows that the district honors all parental exemption requests, regardless of motivation."). Further, the record reflects — and current Minnesota state law requires — that ISD 640 will continue to implement its neutral policy to accommodate future reasonable parental exemption requests.

Faced with a record replete with evidence supporting the Eighth Circuit's decision, Petitioners attempt to conjure up an argument by focusing on portions of one letter written by a private citizen.[8] However, they ignore the testimony of the members of the School Board who made the decision to open the Vesta public school after several public hearings and in full compliance with the law. The only actions that are relevant here — as in any case alleging a constitutional violation — are those of the state actor,

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8. Petitioners rely almost exclusively on a letter written by Lloyd Paskewitz, a private citizen and the lessor of the classroom space that houses the Vesta school. Even on its face, however, this letter does not support Petitioners' misrepresentations. To the contrary, the letter shows that Mr. Paskewitz, along with everyone else, understood from the beginning that the Vesta school would be a *public school with a secular curriculum*, run exclusively by ISD 640, and open to all children. It states that "[w]e have no objection to it being a public school," and that "[w]e have also heard that there might be others besides the Brethren that would want their children enrolled at Vesta." However, the real point is that this letter is irrelevant to the *only* issue in this case: whether a *state actor* — the School District — has taken actions that somehow violate the Establishment Clause. No private citizen's actions — neither those of Mr. Paskewitz nor of anyone else — are at issue. Indeed, early in this litigation the district court itself dismissed Petitioners' claims against Mr. Paskewitz. In doing so, the district court found that on its face the Lease between Mr. Paskewitz and the School District did not violate the Constitution. Petitioners never appealed this ruling.

ISD 640. Private citizens cannot violate the Establishment Clause.[9] Petitioners can cite absolutely no evidence of any improper motivation or action on the part of ISD 640. The Eighth Circuit's opinion is well-founded on uncontraverted record evidence, including numerous relevant documents, discovery responses, and the testimony of over twenty witnesses, among them two successive school superintendents, members of the School Board, both Vesta teachers, a number of area parents, and even experts. Petitioners ignore this record, and do not provide a single record cite in support of their false version of the facts. Consequently their petition presents this Court with a new-found and unsupported factual dispute.

B. Proceedings Below

Petitioners — who live nearly 100 miles away from the Vesta school and have no children in the school system — commenced this suit nearly three years ago seeking to have the Vesta public school closed by court order and to prevent ISD 640 from implementing its neutral accommodation policy that is mandated by state law. They filed suit in a court far away from ISD 640, and

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9. As the Eighth Circuit Court correctly determined, the fact that the School District's actions "coincide with the desires of certain parents does not mean that the Establishment Clause has been violated." *Stark v. ISD 640* at 1075 (8th Cir. 1997). *See also Bowen v. Kendrick*, 487 U.S. 589, 603, n.8 (1988) (statute does not violate the Establishment Clause "simply because some of the goals of the statute coincide with the beliefs of certain religious organizations"); *Clayton by Clayton v. Place*, 884 F.2d 376, 380 (8th Cir. 1989) (finding "no support" for the proposition that government action "becomes unconstitutional due only to its harmony with the religious preferences of constituents"). Nor, as Petitioners seem to suggest, do citizens lose their fundamental right to petition the government simply by virtue of their religious beliefs, or because they have a personal religious motivation for doing so. *See Clayton*, 884 F.2d at 380 (religious groups "have an absolute right to make their views known and to participate in public issues").

sued not only the School District, but also each member of the School Board and several Vesta parents. They even seemingly attempted to sue the adherents of an entire religion (although they apparently never attempted proper service). During this case, Petitioners conducted extensive discovery, including several depositions, numerous affidavits, requests for voluminous documents, and numerous interrogatories (none of which Petitioners even reference in their brief). Defense of the case has required hundreds of pages of briefs in each of at least six separate briefings in three Courts. The public school system in ISD 640 has been disrupted. The energies and resources of school administrators, teachers, parents and students have been drained.

ISD 640 was the only defendant remaining in the case by the time cross-motions for summary judgment were filed in the district court. On August 22, 1996, the district court — in an unprecedented holding — granted summary judgment to the Petitioners and issued a vague and sweeping injunction closing the Vesta public school and preventing the School District from implementing its neutral policy of granting parental exemption requests. Because this neutral accommodation policy is now mandated by Minn. Stat. Ann. § 126.699, the district court's ruling called into question the constitutionality of that law. In addition, the broad injunction prevented the operation of this policy at "any school," threatening not only the other public school in the district at Wabasso, but also implicitly calling into question the constitutional legitimacy of all other public schools in Minnesota where the law is implemented.

Moreover, in holding expressly that the operation of a *public school* by a public school district "lacks a secular purpose," the district court's ruling stood virtually alone in the entire history of Establishment Clause jurisprudence, and contradicted the overwhelming weight of Supreme Court and Eighth Circuit precedent. Indeed, as the Eighth Circuit Court recognized, the district court's decision was errant in many respects, not the least

of which was that it relied primarily on the portion of *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), that was explicitly overruled by *Agostini v. Felton*, 117 S. Ct. 1997, 2006-2017 (1997), subsequent to the district court's decision.

The district court ordered the closing of the Vesta public school just days before the school was scheduled to reopen for fall classes. ISD 640 requested a stay of the ruling on the logical grounds that the immediate closing of one of only two public schools in ISD 640 on such short notice would have caused substantial disruption for the district and its students. Nevertheless, ISD 640's request for a stay was summarily denied by the district court.

On emergency motion by ISD 640, the Eighth Circuit Court issued a stay pending appeal. Ultimately, the Eighth Circuit reversed the unprecedented district court holding and properly decided the case applying the well-settled Establishment Clause law of this Court. Petitioners' request for *en banc* rehearing of the case was denied.

REASONS FOR DENYING THE WRIT

Petitioners' legal arguments are founded solely on their baseless claims of factual error and do not warrant Supreme Court review. The Eighth Circuit Court's opinion is based solidly on — and indeed compelled by — the settled and sound precedent of both the Eighth Circuit and this Court.[10] Petitioners' contortion of the

10. The Eighth Circuit correctly held that ISD 640's neutral actions fully comply with the requirements of the *Lemon* test. *Stark v. ISD 640* at 1073-1075, *citing Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The Court found that ISD 640's actions had a number of valid secular purposes, did not have the primary effect of advancing or endorsing religious beliefs, and did not result in "excessive entanglement," but instead promoted "*less*, rather than *more* involvement

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facts to bolster their strained legal arguments is a tacit but telling admission that they have no constitutional argument under the real facts of this case. Indeed, Petitioners fail to cite any of the record in this case. Petitioners nevertheless cite three reasons they claim support their application for a writ — each of which is already directly addressed and properly refuted in the Eighth Circuit Court's opinion. They are considered in turn below.

I. THE EIGHTH CIRCUIT COURT'S OPINION IS CONSISTENT WITH *EPPERSON* AND *EDWARDS*.

This is not a Creationism case. Petitioners nevertheless make the misguided argument that the Eighth Circuit's decision here conflicts with *Edwards v. Aguillard*, 482 U.S. 578 (1986), and *Epperson v. Arkansas*, 393 U.S. 97 (1968). The *Epperson* Court struck down an Arkansas statute criminalizing the teaching of the theory of evolution to *any* student in any public school or university in the state. In *Edwards*, the Court invalidated the Louisiana Creationism Act, which required creationism to be taught to all students in public elementary and secondary schools where evolution was taught. Both *Epperson* and *Edwards*, then, involved the state-mandated alteration of the substantive curriculum of every public school for *all students* in those schools. As the Eighth Circuit

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with religion." *Id.* As the Court stated, the School District's actions fall "well within the boundaries" of Supreme Court cases interpreting the Establishment Clause. *Id.* at 1075. *See, e.g., Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1983) (providing sign language interpreter to deaf student at Catholic high school upheld); *Mueller v. Allen*, 463 U.S. 388 (1983) (Minnesota's neutral tax deduction for educational purposes did not violate the Establishment Clause even though parents could deduct parochial school expenses). Further, the most recent Supreme Court decision analyzing the Establishment Clause, *Agostini v. Felton*, 117 S. Ct. 1997, which the Eighth Circuit cites in its opinion, clearly teaches that ISD 640's neutral actions in this case fall well within constitutional boundaries.

properly held, "nothing of the sort has happened here." *Stark v. ISD 640*, 123 F.3d at 1074.

In this case "the district's curriculum has not been altered in any way at the Vesta school, and the same curriculum is taught at Vesta as at the Wabasso school." *Id.* The Eighth Circuit Court, therefore, correctly found *Epperson* and *Edwards* to be completely inapplicable here because:

> the curriculum — whether the substantive curriculum or the availability of technology — has not been modified or changed in any way at the Vesta school from what is taught at the Wabasso school.

Stark v. ISD 640 at 1074 (8th Cir.). Accordingly, because *Epperson* and *Edwards* dealt specifically with a blanket alteration of the curriculum of *all* public schools for *all* students, they are inapposite. Petitioners' central argument, therefore, founded entirely on a fundamental factual dispute, falls under its own weight given the true facts of this case. *Epperson* and *Edwards* are not even implicated here, much less offended.

Moreover, Petitioners' argument is based neither in law nor in logic — but solely on an awkward and transparent semantic trick. Petitioners contend that the very act of accommodating reasonable individual exemption requests pursuant to a neutral policy — standing alone — somehow *ipso facto* constitutes a broad based curriculum alteration for all students. According to Petitioners, the exemption of any individual student from any aspect of the curriculum pursuant to a state-mandated neutral accommodation policy *per se* constitutes a universal alteration of the public school curriculum of the kind struck down in *Epperson* and *Edwards*.

But to state this argument is to refute it. In this case, individual parents at the Vesta school have requested a conscience-based

exemption from an aspect of the curriculum offered at the school. Accommodating these parental requests pursuant to a state's neutral policy does not affect either the substance of the curriculum that continues to be offered at the Vesta school or the content of any other student's education. Nor do private individual choices made pursuant to a neutral policy somehow constitute state action. Indeed, if Petitioners' flawed reasoning were accepted, then accommodating any student at any public school would per se constitute an unconstitutional "curriculum alteration" as wrongly understood by Petitioners. This would not only invalidate ISD 640's policy and Minnesota's statute, but any attempt anywhere to accommodate on a neutral basis the consciences of individual parents and students. Fortunately, this is not supported, much less compelled, by existing law.[11]

Petitioners also wrongly assert that the court's decision in this case somehow "conflicts" with certain decisions of other federal courts. However, none of the few cases Petitioners cite remotely support their contention. For example, Petitioners point to *Parents Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235 (2nd Cir. 1986), which, on its facts, is manifestly inapposite.[12] *Quinones* involved the closing off of an entire section of a public school and allowing

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11. This Court has long held that government may — and sometimes must — accommodate religious practice and may do so without offending the Establishment Clause. *See, e.g. Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Zorach v. Clausen*, 343 U.S. 306, 312-14 (1952); *See also HSU v. Roslyn Union Free School Dist.*, 85 F.3d 839, 864-67 (2d Cir. 1996); *Spence v. Bailey*, 465 F.2d 797 (6th Cir. 1972). In fact, the court has held — contrary to what Petitioners urge here — that religious individuals may not be *excluded* from neutrally available benefits simply because of their religious beliefs. *See, e.g. Rosenburger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995).

12. The actions at issue in *Quinones* were an effort to comply with the requirements of *Aguilar v. Felton*, which, as discussed, was overruled in *Agostini*.

access only to Hasidic girls and no other students. The Hasidic girls were given a separate entrance to the school building so as to avoid all contact with other students. Only female teachers were allowed to instruct the girls and they were taught in Yiddish. *Id.* at 1237, 1241. Thus non-Hasidic children (indeed, even Hasidic boys) were physically excluded from an entire section of the public school, as were male teachers, because of the tenets of the Hasidic faith. *Id.* at 1241.[13]

Obviously, *Quinones* is not pertinent here because "the Vesta school does not involve the complete segregation and dedication of part or all of a public facility to a group of students for religious reasons as in *Quinones*." *Stark v. ISD 640*, 123 F.3d at 1074. No one is excluded from attending the Vesta School because of religion or gender. No one is excluded from teaching at Vesta because of religion or gender. In short, *Quinones* does not apply.

The only other cases cited by Petitioners involved interpretations of the Free Exercise Clause, not the Establishment Clause. *Swanson v. Guthrie Independent School District No. I-L*, 135 F.3d 694 (10th Cir.) (school district's refusal to allow part-time class attendance and part-time home schooling did not violate student's free exercise rights); *Battles v. Anne Arundel County Board of Education*, 904 F. Supp. 471 (D. Md. 1995) (free exercise clause was not offended by Maryland's system of limited state monitoring of home schooling); *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1064 (6th Cir. 1987), *cert. denied*,

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13. Similarly, in *Bollenbach v. Board of Education*, 659 F. Supp. 1450 (S.D.N.Y. 1987), also cited by Petitioners, a district court found unconstitutional a school district's decision to assign only male bus drivers with less seniority on routes encompassing a Hasidic community in order to accommodate Hasidic beliefs requiring separation of the sexes. 659 F. Supp. at 1464. The case, brought by female bus drivers, turned on the rights of bus drivers to be free of sex-based discrimination. On its own terms, the case is inapplicable.

484 U.S. 66 (1988) (free exercise clause does not *require* a school district to exempt students from being exposed to ideas expressed in a particular set of readers).[14] As one might generally expect, it is somewhat difficult for cases involving interpretations of *different* constitutional provisions to "conflict" as petitioners claim. Again, all of these cases involved claims by individuals to compel school districts to take actions because of the Free Exercise Clause; they did not involve Establishment Clause challenges to neutral school district action. Further, each case affirms the broad discretion of local School Boards. Petitioners' reliance on them proves nothing except their own misunderstanding of this case.

In essence, the issue presented by this case is not whether ISD 640 or the state of Minnesota *must* grant conscience-based parental exemption requests, but whether the School District and the state *may* in their discretion decide to do so pursuant to a neutral statute or policy. This is not a case about what is *required* by the Free Exercise Clause, but what is *permitted* by the Establishment Clause. Here, ISD 640's actions not only fully comply with the requirements of the Establishment Clause, but, as the Eighth Circuit Court found, exemplify the concern for neutrality that is at the heart of this Court's Establishment Clause jurisprudence.[15] Because

14. Petitioners also inexplicably cite *Bauchman v. West High School,* 900 F. Supp. 254 (D. Utah 1995), which involved both Free Exercise and Establishment Clause claims brought by a student in a public high school choir because of the music teacher's choice of certain explicitly Christian religious music and Christian religious sites for performances of the school's a'cappella choir. The court held that there was no Establishment Clause violation. Further, the court found no Free Exercise violation precisely because the school in that case accommodated the student's objections by excusing her from participation in activities she or her parents found objectionable.

15. This Court has stated that "[a] central lesson of our decisions is that a significant factor in upholding government programs in the (Cont'd)

this case is about what a School District *may* do, not what it *must* do, the Free Exercise cases cited by Petitioners are not even on point and certainly not in conflict with the Eighth Circuit's decision.

II. THE EIGHTH CIRCUIT'S OPINION IS CONSISTENT WITH KIRYAS JOEL.

Petitioners' assertion that this case is contrary to *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994), misconstrues both *Kiryas Joel* and this case. "This case is not *Kiryas Joel*." *Stark v. ISD 640* at 1075 (8th Cir. 1997). And despite the claims in their recent brief, at oral argument before the Eighth Circuit Court, counsel for Petitioners took a much different view of *Kiryas Joel* and its application to this case:

> Judge Wollman: ". . . Where in this case is the delegation of state authority to a religious group that existed in *Kiryas Joel*? Does it exist here?"
>
> Mr. Bruno: "Not the delegation, no."[16]

(Cont'd)
face of Establishment Clause attacks is their neutrality toward religion." *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 839 (1995). The Court has "frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges." *Id. quoting Kiryas Joel*, 512 U.S. at 703 (Souter, J.). ISD 640's actions are "well within the boundaries set by cases in which the Supreme Court has upheld government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion." *Stark v. ISD 640*, 123 F.3d at 1076, *quoting Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

16. As Petitioners themselves established through discovery, no individuals subscribing to what Petitioners describe as the "Brethren" belief system has any authority whatsoever over the operation of the (Cont'd)

> Judge Wollman: "Where in this case is the drawing of a district line to exclude others than the Brethren."
>
> Mr. Bruno: "We don't think that a political line has been drawn."
>
> Judge Wollman: "Weren't both of those considerations powerful incentives to the Court's decision in *Kiryas Joel*?"
>
> Mr. Bruno: "Those were some of the considerations. I think there were other considerations in *Kiryas Joel*. ***But I don't think Kiryas Joel is our strongest case here.***"

Transcript of Oral Argument at 20 (emphasis added) (Appendix A).[17]

As was recognized by Petitioners' own counsel at oral argument, *Kiryas Joel* is inapposite. "[T]he record does not support

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(Cont'd)
Vesta public school. It is undisputed that no member of the School Board subscribes to religious beliefs of the Brethren, and no member of the Brethren ever has or ever will serve on the School Board, because it is against their beliefs to participate in any political activities, including voting. Therefore, adherents of this belief system have absolutely no authority over ISD 640 or the operation of the Vesta public school. Certainly, there has been no "delegation" of state authority to a religious group of the sort at issue in *Kiryas Joel*.

17. Indeed, in a brief filed recently by counsel for Petitioners in another Establishment Clause case, counsel for Petitioners describes the *Stark* case as one involving application of a neutral state policy "because the benefits of the statute under consideration were generally available." *See* Brief in Support of Motion for Summary Judgment, *Children's Health Care is a Legal Duty, Inc. v. DeParle*, at p. 25 (Appendix B).

Stark's and Neely's contention that the district has taken special actions to wrongly benefit the Brethren. . . ." *Stark v. ISD 640*, 123 F.3d at 1075 (8th Cir.). Here, ISD 640's actions are entirely neutral and only provide benefits that are generally available to any parent. Any parent can send a child to the Vesta public school, and any parent can object to elements of a child's curriculum and receive alternative instruction for a child.

Further, unlike *Kiryas Joel*, the record in this case establishes that ISD 640's policy of accommodation has been implemented by ISD 640 many times in the past for other parents requesting a variety of exemptions. *Id.* at 1072. As noted in *Kiryas Joel* itself, 512 U.S. at 687, 703, the Court "has frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges." As the Eighth Circuit Court has already correctly determined, the factual record in this case is nothing like *Kiryas Joel*.

Finally, Petitioners also vaguely raise the specter of "endorsement." However, the suggestion that ISD 640's actions in this case somehow constitute an endorsement of anyone's religious beliefs ignores the factual record and mistakes the true nature of "endorsement analysis." Indeed, Petitioners do not even attempt to cite any record evidence to support their "endorsement" claim. The Eighth Circuit Court correctly held that "the district has acted neutrally in this case towards the citizens of the district regarding the decision to open the School in Vesta and in applying the exemption policy. Thus, the district has not made anyone's adherence to religion relevant to their standing in the community and consequently has not endorsed religion or a set of religious beliefs." *Stark v. ISD 640*, 123 F.3d at 1077. Petitioners' attempt to apply the "endorsement test" to a false version of the facts conflicts with this Court's description of that test. *See, e.g., Capital Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 772-80 (1995) (O. Connor, J., concurring) ("the endorsement test

necessarily focuses on the perception of a reasonable, informed observer" not a "casual passerby" who is mistaken about the facts). In short, under the endorsement test, "erroneous conclusions do not count." *Id.* at 764-66.[18] More to the point, this Court has stated that "as a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion." *Id.* at 764. ISD 640's neutral actions do not come close to endorsement.

III. THE SCHOOL DISTRICT'S ACTIONS IN THIS CASE EXEMPLIFY THE IDEALS OF THE FIRST AMENDMENT.

The last argument Petitioners present is the unsupported suggestion that the Eighth Circuit's decision somehow approves "the balkanization of the public schools along religious lines" and undermines "cohesion" in the public schools. Like their other two arguments, this one is based exclusively on Petitioners' factual dispute with the Court below. Despite Petitioners' contentions, the School District's neutral actions in this case actually promote

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18. No one in the ISD 640 community has ever perceived the School District's neutral actions in this case to be an endorsement of anyone's religious beliefs. Indeed, all of the teachers in the local chapter of the state teachers union voted unanimously to support the School District in this case. Contemporaneous newspaper accounts, even to the extent they are relevant, made clear that the Vesta school is a public school that is open to any who wish to attend classes there. No local citizen has ever objected to the Vesta public school or the School District's neutral accommodation policy. In fact, many local parents have taken advantage of the policy. Only Petitioners — who live over 100 miles away from the Vesta public school — have ever objected to ISD 640's actions. With respect to "endorsement," this Court has stated that "we refer only to what would be thought by 'the community' — not by outsiders or by individual members of the community uninformed about the school's practice." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 764-66 (1995) (plurality opinion).

cohesion in the public schools and avoid any "divisive" disputes among parents, teachers, administrators and students.

ISD 640's accommodation of parental exemption requests at both the Vesta and Wabasso schools is conducted pursuant to a neutral, state-mandated policy, without regard to parental motivations. Thus, as a policy matter, the Minnesota legislature and ISD 640 have determined that the best approach in these matters is to respect the concerns of parents regarding the education of their children; to assume that the parents' conscience-based requests are made in good faith; to avoid searching inquiries by administrators into parental motivations for such requests; and to avoid discriminating among requests based on the substance of parental motivations. These neutral actions are well within the boundaries set by cases in which this Court has upheld "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion." *Stark v. ISD 640*, 123 F.3d at 1075.[19] The "district's actions in this case follow our best

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19. *See, e.g., Rosenberger,* 515 U.S. at 837-45 (neutral program for paying for printing of student publications) ("The guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."); *Zobrest v. Catalina Foothills Sch.* Dist., 509 U.S. 1, 8 (1993)(sign language interpreter for deaf student at Catholic high school); *Bowen v. Kendrick*, 487 U.S. 589, 608 (1988) (Adolescent Family Life Act did not violate the Establishment Clause despite the fact that religious organizations received funding pursuant to its neutral provisions); *Witters v. Washington Dep't of Servs. For the Blind*, 474 U.S. 481, 487 (1986) (vocational assistance to individual studying at Christian college did not violate the Establishment Clause); *Mueller v. Allen*, 463 U.S. 388, 398-99 (1983) (Minnesota's neutral tax deduction for educational expenses did not violate the Establishment Clause despite fact that parents could deduct parochial school expenses); *Widmar v. Vincent*, 454 U.S. 263, 274-75 (1981) (open access to university facilities).

traditions of accommodation of religious beliefs in the school context." *Id.* at 1076.

Ironically, only Petitioners' view would promote significant religious divisiveness and "balkanization," as they refer to it, in the public schools. In essence, Petitioners adopt the untenable position that a neutral statute like Minn. Stat. Ann. § 126.699 may operate in all cases, *except where parental requests for exemption are founded on religious beliefs.* This position not only conflicts with the settled legal principle that neutral statutes do not offend the Establishment Clause, but would itself destroy the neutrality of the existing statute, and in effect mandate discrimination based on religious beliefs and viewpoints. If Petitioners' views prevailed, and Minnesota school districts were forced to reject *only* those conscience-based parental requests for exemption based on religious beliefs, then administrators would have to conduct a searching inquiry into parental motivations as part of considering each requested exemption to determine if religious beliefs played any role, however minor, in a particular request. Apart from being impractical and divisive, this would require government to limit access to a general statutory policy based solely on the particular viewpoint of the citizen requesting an exemption, and would itself violate the Constitution. *See, e.g., Rosenberger,* 115 S. Ct. 2510 (individuals may not be excluded from neutrally available benefits simply because of their religious beliefs).

In any event, such a troubling policy is certainly not, as Petitioners contend, *required* by the Establishment Clause. In sum, ISD 640's neutral accommodation policy is not only constitutional, it works.

CONCLUSION

The Eighth Circuit Court's decision, founded squarely on the clear and substantial factual record in this case, rests solidly on Eighth Circuit and Supreme Court precedent. It should not be disturbed. Petitioners' assertions of factual error do not counsel Supreme Court review. This Court should not spend its scarce resources rehearing a case that has already been closely considered and properly decided, nor should it cause further expenditure of the scarce resources of a small rural school district. Clearly, such review is not justified based on Petitioners' new-found dispute with the factual record. For the reasons given, Petitioners' application for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED NOVEMBER 20, 1996

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3250 MNST

St. Paul, Minnesota
November 20, 1996
2:00 o'clock p.m.

Matthew Stark, Marcia Neely,

Plaintiffs/Appellees,

vs.

Independent School District, No. 640, and the members of its Board of Directors,

Defendant/Appellant,

Leon Plaetz, Curtis Trost, Scott Frederickson, Tom Franta, Barb Beranek, Alois Guetter,

Defendants.

TRANSCRIPT OF PROCEEDINGS
(ORAL ARGUMENT)

BEFORE THE HONORABLE ROGER L. WOLLMAN,
C. ARLEN BEAM, AND DIANA E. MURPHY
UNITED STATES COURT OF APPEALS

Appendix A

* * *

JUDGE WOLLMAN: That would be my next question. Where in this case is the delegation of state authority to a religious group that existed in *Kiryas Joel*? Does it exist here?

MR. BRUNO: Not the delegation, no.

JUDGE WOLLMAN: Where in this case is the drawing of a district line to exclude others than the Brethren?

MR. BRUNO: We don't think that a political line has been drawn.

JUDGE WOLLMAN: Weren't both of those considerations powerful incentives to the Court's decision in *Kiryas Joel*?

MR. BRUNO: Those were some of the considerations. I think there were other considerations in *Kiryas Joel.* But I don't think *Kiryas Joel* is our strongest case here.

* * *

APPENDIX B — EXCERPTS OF PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT DATED FEBRUARY 13, 1998

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civ. 97-1794

Judge Ann Day Montgomery

CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INCORPORATED, et al.

Plaintiffs

vs.

NANCY-ANN MIN DePARLE, et al.,

Defendants

and

FIRST CHURCH OF CHRIST, SCIENTIST,

Defendant-Intervenor

PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO THE MOTIONS FOR SUMMARY JUDGMENT OF DEFENDANTS AND DEFENDANT-INTERVENOR

(ORAL ARGUMENT IS REQUESTED)

Appendix B

Dated: February 13, 1998.

Robert J. Bruno (#12415)
Attorney for Plaintiffs
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612/890-9171

* * *

There is recognition in the Conference Agreement and the briefs of the responding parties and their allied amicus curiae in this case that the RNHCI nursing services are not generally available. They are referred to as "comparable" in the Conference Agreement, Pl. Attachment 6, at 79, as they were described in the Conference Report in 1965. Defendants refer to them as "some benefit," Def. Mem., at 7, "limited health care benefits," *id.*, at 19, "needed health care services," *id.*, at 21, "nonmedical components of inpatient hospital care,"[16] *id.*, "alternative nonmedical benefit in lieu of benefits otherwise available for traditional medical care." *Id.*, at 23, n. 13.

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16. Defendants refer in footnote 11 to the unbundling of the nonmedical components of inpatient hospital services without explaining what they mean by these nonmedical components. Plaintiffs have submitted an affidavit that there are no such nonmedical components of hospital services in the medical setting. If Defendants are referring to the custodial care services described in the Robyn Filbert Affidavit filed by the Church, such unbundling is a benefit to which no one else is entitled and which would be highly prized by the residents of thousands of "board and care" facilities. In this respect this case is distinguishable from *Stark v. Independent School Dist. No. 640,* 123 F.3d 1068, cited in Defendants' Memorandum, note 13, because the benefits of the statute under consideration were generally available.

APPENDIX C — EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS DATED JUNE 7, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil 3-94-1597

St. Paul, Minnesota
June 7, 1996
9:00 o'clock a.m.

Matthew Stark and Marcia Neely,

Plaintiff,

-v-

Independent School District No. 640

Defendant.

TRANSCRIPT OF PROCEEDINGS
(MOTION)

BEFORE THE HONORABLE MICHAEL J. DAVIS
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

ON BEHALF OF PLAINTIFFS:

TIMOTHY BRANSON, ESQ.
ROBERT BRUNO, ESQ.

Appendix C

ON BEHALF OF DEFENDANT:

PAT A. CIPPOLLONE, ESQ.
ERICK KAARDAL, ESQ.
C. HUNTER WIGGINS, ESQ.

* * *

MR. BRANSON:

[3] * * *

What exactly they did, I think the facts, Your Honor, one of the few things the parties agree on is that the facts are undisputed, and I think the core nucleus of facts is relatively small.

* * *